

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs August 1, 2023

FILED

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Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. BRIAN ALLEN ARMSTRONG**

**Appeal from the Circuit Court for Madison County  
No. 21-504 Roy B. Morgan, Jr., Judge**

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**No. W2022-01397-CCA-R3-CD**

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A Madison County jury convicted Defendant, Brian Allen Armstrong, of two counts of possession of a firearm by a convicted felon and one count of possession of a prohibited weapon. The trial court sentenced Defendant to an effective term of fifteen years in the Tennessee Department of Correction. On appeal, Defendant argues that the evidence was insufficient to sustain his convictions and that the trial court erred in denying his requested jury instruction on the defense of necessity. After reviewing the record, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

MATTHEW J. WILSON, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Marcus A. Lipham (at trial and on appeal) and John Shipley (at trial), Jackson, Tennessee, for the appellant, Brian Allen Armstrong.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Lee R. Sparks, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Trial**

On April 6, 2021, police officers in Jackson, Tennessee, seized a sawed-off shotgun from a camouflage-painted Jeep Cherokee the officers saw Defendant driving approximately thirty minutes earlier. In October 2021, the Madison County Grand Jury indicted Defendant on two counts of unlawful possession of a firearm by a convicted felon (prior conviction for a violent felony), a Class B felony; one count of unlawful possession

of a firearm by a convicted felon (prior conviction for a felony drug offense), a Class C felony; one count of possession of a prohibited weapon, a Class E felony; and one count of removal of an automobile registration tag, a Class C misdemeanor. The State dismissed one of the felon in possession of a firearm (prior violent felony conviction) counts before trial, and the State entered a nolle prosequi on the count alleging removal of a vehicle registration tag after trial began but before the jury deliberated. A total of three counts were later submitted to the jury.

At trial, Jacob Lee Exline, a Staff Sergeant with the Tennessee Army National Guard and a member of the Governor's Counterdrug Task Force, testified that on April 5 and 6, 2021, he and his partner, Timothy McCormick, were conducting surveillance outside of a Madison County house in anticipation of a search warrant being executed at the house. On April 5, 2021, Sergeant Exline and his partner saw Defendant outside of the house, retrieving mail from the mailbox. They also noticed a dark-colored Jeep Cherokee parked at the residence. The State introduced into evidence photographs of Defendant and the Jeep that were taken April 5. Sergeant Exline and his partner returned to the house and resumed their surveillance in the early morning hours of April 6, 2021, and about forty-five minutes to an hour later, Sergeant Exline saw the Jeep pull into the driveway. After Defendant exited the vehicle and went inside, Sergeant Exline contacted local law enforcement, which arrived about twenty-five to thirty minutes later. Nobody entered or otherwise approached the Jeep in between the time of Defendant's arrival at the house and local law enforcement's arrival.

Jackson Police Department Investigators Robert Pomeroy and Paul Bozza were among the local law enforcement personnel who arrived at the house. Investigator Pomeroy testified that when officers arrived at the house to serve the search warrant, the SWAT team cleared the house. When Investigator Pomeroy approached the house, he looked in the vehicles parked there to make sure no one was in them. One of the vehicles was the Jeep Defendant had driven to the house. From the driver's side window of the Jeep, he saw "the butt end of a shotgun and the barrel of a shotgun in the floorboard." Investigator Pomeroy notified Investigator Bozza, who then removed the weapon, a sawed-off 12-gauge Harrington and Richardson shotgun, from between the driver's seat and the center console of the Jeep. The gun was loaded, and Investigator Bozza found another shell in the Jeep's center console. Investigator Bozza measured the barrel of the shotgun, which was fourteen and a half inches long. Inside the house, Investigator Bozza found 12-gauge shotgun shells inside a child's playpen, the same caliber as the sawed-off shotgun. Officers arrested Defendant.

Investigators Bozza and Ashley Robertson interviewed Defendant. During the interview, Defendant stated that another man was staying at the residence but left the house because the other man "had some warrants[.]" Defendant told the investigators that while

the shotgun belonged to the other man, Defendant put the shotgun under the passenger seat because a woman, later identified as Ashley Grady,<sup>1</sup> “wanted to kill herself.” Investigator Bozza found the shotgun between the center console and the driver’s seat. When confronted with this detail, Defendant stated he did not remember moving the gun because his drug use affected his memory.

Investigator Bozza then interviewed Ms. Grady, the house’s female occupant, who told the investigator that she was upset over her brother’s recent death. Investigator Bozza did not recall Ms. Grady stating she wanted to harm herself, but he acknowledged that he “didn’t go back and ask her if she was threatening to kill herself.” Ms. Grady told Investigator Bozza that the house’s other male occupant, Bernie Young, had left the house and taken most of his belongings with him. Ms. Grady said that either Mr. Young gave Defendant the shotgun or Defendant stole the gun from Mr. Young. Investigator Bozza testified he was unaware of any fingerprint or DNA testing on the shotgun.

According to Investigator Bozza, Ms. Grady stated that on one occasion she gave Defendant \$20 to purchase cigarettes, and did not give Ms. Grady the change from the purchase. When she looked inside the Jeep for change, she saw the shotgun. The investigator testified, “she didn’t say that was at that time. She said that that was prior. I don’t know at what time she went inside that vehicle.”

The State introduced certified copies of Defendant’s prior judgments of conviction from Maury County, Tennessee: a December 2013 judgment reflecting Defendant was convicted of one count of aggravated burglary, a Class C Felony; and a June 2008 judgment reflecting Defendant was convicted of one count of sale of a counterfeit controlled substance, a Class E Felony. After the State rested its case, Defendant presented no proof on his behalf.

Before the case was submitted to the jury, defense counsel requested an instruction on necessity. As explained in detail below, the trial court rejected Defendant’s proposed instruction. The jury found Defendant guilty on all three counts—two counts of unlawful firearm possession by a convicted felon (one count with the prior conviction being a crime of violence, one count with the prior conviction being a felony drug offense), and one count of possessing a prohibited weapon (the sawed-off shotgun). The trial court sentenced Defendant to an effective term of fifteen years in the Department of Correction.

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<sup>1</sup> This witness was also referred to as Ashley Jones in the record.

## II. Analysis

### A. Sufficiency of the Evidence

On appeal, Defendant argues the evidence produced by the State at trial was insufficient to sustain his convictions for unlawful firearm possession by a convicted felon and unlawful possession of a prohibited weapon. Specifically, Defendant argues that the State failed to prove beyond a reasonable doubt that he possessed the sawed-off shotgun at the time Investigator Bozza seized the shotgun. We disagree.

The standard of review for a claim challenging the sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)); *see* Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). This standard of review is identical whether the conviction is predicated on direct evidence or circumstantial evidence, or a combination of both. *State v. Williams*, 558 S.W.3d 633, 638 (Tenn. 2018) (citing *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011)).

A guilty verdict removes the presumption of innocence and replaces it with one of guilt on appeal, therefore, the burden is shifted to the defendant to prove why the evidence is insufficient to support the conviction. *Davis*, 354 S.W.3d at 729 (citing *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)). On appeal, “we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.” *Id.* at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). In a jury trial, questions involving the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual disputes raised by such evidence, are resolved by the jury as the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 405, 410 (Tenn. 1990). Therefore, we are precluded from re-weighting or reconsidering the evidence when evaluating the convicting proof. *State v. Stephens*, 521 S.W.3d 718, 724 (Tenn. 2017).

In this case, Defendant was convicted of two counts of unlawful possession of a firearm by a convicted felon. “A person commits an offense who unlawfully possesses a firearm” and “[h]as been convicted of a felony crime of violence, an attempt to commit a felony crime of violence, or a felony involving use of a deadly weapon” or “[h]as been convicted of a felony drug offense.” Tenn. Code Ann. § 39-17-1307(b)(1)(A) and (B). At the time of this incident, it was an offense under state law for a person to “intentionally or

knowingly possess[.]” a “short-barrel rifle or shotgun[.]”<sup>2</sup> Tenn. Code Ann. § 39-17-1302(a)(4) (repealed July 1, 2022).

Defendant does not contest that the two judgments of conviction introduced at trial were for a crime of violence and a felony drug offense. Nor does Defendant contest that the sawed-off shotgun recovered from the Jeep was a short-barrel shotgun. Instead, Defendant’s sole argument is that the State failed to establish beyond a reasonable doubt that he “possessed” the sawed-off shotgun at the time of his arrest.

Possession may be either actual or constructive and exercised by only one individual or jointly with others. *State v. Copeland*, 677 S.W.2d 471, 476 (Tenn. Crim. App. 1984); *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001). For constructive possession, the evidence must show that the accused had the ability and intent to dominate the contraband directly or through others. *State v. Robinson*, 400 S.W.3d 529, 534 (Tenn. 2013). Constructive possession considers the totality of the circumstances and circumstantial evidence may be offered as proof. Inferences and circumstantial evidence may be used to show that a person knowingly possessed contraband. *State v. Brown*, 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995). If the accused does not exclusively possess the place where the contraband is discovered, evidence must be offered that would allow a factfinder to reasonably infer an affirmative link between the accused and the contraband. *State v. Collins*, No. W2019-01415-CCA-R3-CD, 2020 WL 1972612, at \*5 (Tenn. Crim. App. Apr. 24, 2020), *perm. app. denied* (Tenn. Sept. 21, 2020). It is not enough that the accused and contraband be in the same vicinity. Nor is it sufficient to merely associate with the person who controls contraband or property where contraband is found. *State v. Brown*, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991).

Here, when viewed in a light most favorable to the State, the evidence produced at trial established that Sergeant Exline saw Defendant driving the Jeep when he arrived at the house the morning of his arrest. Nobody entered the Jeep between Defendant’s arrival at the house and the time Investigators Bozza and Pomeroy and the other local authorities arrived. Defendant admitted to Investigator Bozza that he (Defendant) placed the shotgun inside the Jeep. Further, the sawed-off shotgun was readily visible from the window of the Jeep and the investigators saw the shotgun between the driver’s seat and the center console. Ms. Grady’s statement linked Defendant to the shotgun, when she told Investigator Bozza that either Defendant stole the shotgun, or it was given to him by another occupant of the house.

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<sup>2</sup> At the time of Defendant’s arrest, Tennessee law defined a short-barreled shotgun as having a barrel length of less than eighteen inches, or an overall firearm length of less than twenty-six inches. Tenn. Code Ann. § 39-17-1301(14).

Defendant argues that because “Ms. Grady was the last person inside the vehicle” and Defendant “was asleep on the couch inside the residence at the time the firearm was located outside of the residence,” the evidence was insufficient for the jury to find beyond a reasonable doubt that Defendant had possession of the shotgun at the time of his arrest. However, this misstates the evidence. Defendant was the last person inside the vehicle. Sergeant Exline did not see anyone enter the Jeep after Defendant parked it at the residence the day of Defendant’s arrest. While Ms. Grady told Investigator Bozza that she saw the shotgun inside the Jeep when she searched the Jeep for change, but there is no proof that this occurred after Defendant drove the Jeep to the house. In sum, Defendant’s contention is not supported by the evidence, which was sufficient for the jury to conclude beyond a reasonable doubt that Defendant had constructive possession of the sawed-off shotgun at the time of his arrest. The evidence was therefore sufficient to sustain Defendant’s convictions, and he is not entitled to relief on this issue.

## B. Necessity Jury Instruction

Defendant next argues the trial court erred by refusing to instruct the jury on the defense of necessity. Defendant asserts the instruction should have been given because he placed Bernie Young’s shotgun in the Jeep only out of concern for Ms. Grady, who had threatened to kill herself. The State counters that the trial court properly found the evidence did not support issuing such an instruction. We agree with the State.

### 1. Arguments and Ruling at Trial

At the end of the proof, defense counsel requested that the judge instruct the jury on the defense of necessity. The prosecutor replied:

Your Honor, necessity is an instruction utilized in an extreme circumstance; in other words, it is necessary in this particular moment to prevent a greater harm. At the point that this weapon is discovered, it was—there was no longer any threat of—either by—from Ms. Grady committing any kind of suicide. At that point, [Defendant] was simply in possession of a firearm. He was knowingly in possession of it and made no steps to get rid of the weapon or to distance himself from the weapon. This is a very different situation in which somebody deprives an aggressor, a felon deprives an aggressor of a firearm in order to prevent that firearm being used either against him or another, and then distance himself from the firearm at a later point. This is a very different circumstance. Even if at the time that the firearm was acquired, it was under circumstances such as that, by the time the firearm was recovered and actually found—he was found to be in possession of that firearm, that situation no longer existed. So the emergency

or the necessity of the moment was no longer in existence at the time that the firearm was recovered.

Defense counsel countered:

Your Honor, the State brought up the point that they don't believe that there was emergency that would qualify for the use of necessity defense. To that regard, Your Honor, we heard Investigator Bozza testify from the stand here today that he knew that [Ms. Grady] was a known drug user, that she had a past history of drug use. He also talked about that he became aware that she had mental health issues, and he also testified that she was depressed about the death of her brother. And I think the totality of all those circumstances, being a drug user, having a mental health issue and her brother passing away putting her in a mental state where someone could reasonably believe that her possessing that firearm posed a danger to herself through suicide, posed a danger to himself if she used that weapon against him, and posed a danger or a threat to society at large if she were to fire that weapon just randomly out into the public. So while they say there's no emergency, in [Defendant's] eyes there's definitely an emergency. . . . [H]e may have possessed the firearm, but the defense is necessity. It doesn't last for one second, where somebody says, "I'm going to take this gun and I'm going to kill somebody." If he believes in his mind that, and a reasonable person would believe that, based on the totality of the circumstances, she could pose a threat to himself, to herself or to the public, then the necessity charge is needed.

The State then contended that even if Defendant's assertion about Ms. Grady's mental state were true, necessity would not apply because Defendant "didn't actually get rid of it, remove it from the scene and remove it from her access. It was still there. It was still plainly available to her but certainly to him."

The trial court denied Defendant's request for a necessity instruction, stating:

The defense is limited to where [Defendant] acts upon a reasonable belief that the action is necessary, the action is necessary, and emphasize that. What did he do? What was his action in this case? It's not like a shootout by a convicted felon. There are cases like this, I've tried them, where I grabbed a gun and possessed it because I'm defending myself and those third parties. What did this Defendant do? So whether Defendant acts with a reasonable belief that the action he took is necessary to avoid harm and where the harm

sought to be avoided is clearly, clearly, that's the language used, greater than the harm caused by the criminal act.

Here's the situation and what I've heard. I don't know the extent of Ms. Grady's problems. I know that the sworn testimony is that she had this discussion with this officer and you let the testimony in where she had a theory about how this gentleman, [Defendant], got the gun, and she didn't indicate anything to the officer, according to the sworn testimony I heard, about thinking about committing suicide, or, "I'm just going to kill myself," or, "[h]e moved the gun because I was a threat of harm of myself or to others." None of that's on the record for me to consider in this case at all. You know, people, I assume, can be depressed over the loss of a loved one, we've all experienced it, but that just to say, well, she lost her brother, I mean, that doesn't mean that the defense of necessity is given because it's to the level now, and I've discussed the standard, that she's going to kill herself, threaten suicide or threaten others. That's just not in the record at all.

And then on top of that, you do have to go a step further. What was [Defendant's] actions, even if you bought into this claim of necessity? He put the gun outside in a truck, or Jeep, that you can clearly see through the window it's not locked. It's accessible along with shells, one in the chamber. He took this gun and left one in the chamber. His actions, was it justified for him to do that?

There's so many other things he could have done, I just don't find under the record as it stands now that the defense of necessity is something that the [c]ourt can charge to the jury based upon the testimony, the proof in this case, and that's all I can rely on. The proof in the case.

## 2. Standard of Review

Defendants have a constitutional right to a "correct and complete charge of the law." *State v. Hollis*, 342 S.W.3d 43, 50 (Tenn. Crim. App. 2011); *Cauthern v. State*, S.W.3d 571, 600 (Tenn. Crim. App. 2004). Consequently, trial courts are required, without request, "to give 'a complete charge of the law applicable to the facts of the case.'" *Hollis*, 342 S.W.3d at 50 (quoting *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998)). "A trial court's refusal to grant a special instruction is error only when the general charge does not fully and fairly state the applicable law." *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013) (citations omitted). On appeal, we review "the charge as a whole in determining whether prejudicial error has been committed." *Hollis*, 342 S.W.3d at 50 (quoting *In re Estate of Elam*, 738 S.W.2d 169, 174 (Tenn. 1987)). "A charge is

prejudicially erroneous “if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law.” *Id.* (quoting *State v. Vann*, 976 S.W.2d 93, 101; *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997)). An error or misstatement in jury instructions is subject to constitutional harmless error analysis. *State v. Faulkner*, 154 S.W.3d 48, 60 (Tenn. 2005).

“Necessity is one example of a general defense.” *Id.* The Tennessee Supreme Court has established that a general defense:

[N]eed not be submitted to the jury unless it is “fairly raised by the proof.” Tenn. Code Ann. § 39-11-203(c) (2010). The quantum of proof necessary to fairly raise a general defense is less than that required to establish a proposition by a preponderance of the evidence. To determine whether a general defense has been fairly raised by the proof, a court must consider the evidence in the light most favorable to the defendant and draw all reasonable inferences in the defendant’s favor. Whenever admissible evidence fairly raises a general defense, the trial court is required to submit the general defense to the jury. From that point, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defense does not apply. *State v. Bledsoe*, 226 S.W.3d [349,] 355 [(Tenn. 2007)].

*Hawkins*, 406 S.W.3d at 129.

Tennessee law defines the defense of necessity and provides that “conduct is justified, if: (1) [t]he person reasonably believes the conduct is immediately necessary to avoid imminent harm; and (2) [t]he desirability and urgency of avoiding the harm clearly outweigh the harm sought to be prevented by the law proscribing the conduct, according to ordinary standards of reasonableness.” Tenn. Code Ann. § 39-11-611. In other words, conduct that is ordinarily criminal is justified when the accused reasonably believes it is *necessary* to avoid imminent and *greater* harm. *See State v. Watson*, 1 S.W.3d 676, 678 (Tenn. Crim. App. 1999). “The defense of necessity excuses criminal liability in those exceedingly rare situations where criminal activity is an objectively reasonable response to an extreme situation.” *Id.* (citing Tenn. Code Ann. § 39-11-609 Sentencing Commission Comments). That is, “a person of ordinary fitness would have been unable to resist or reasonably believ[ed] that criminal action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense does not deserve criminal punishment.” *State v. Green*, 995 S.W.2d 591, 606 (Tenn. Crim. App. 1998).

“The need to choose the lesser evil must be both imminent and necessary in the sense that the defendant must have a reasonable belief that there is going to be immediate harm and the only way to avoid the harm is by committing the lesser evil.” *State v. Cole-*

*Pugh*, 588 S.W.3d 254, 261 (Tenn. 2019) (quoting W. Mark Ward, *Tenn. Crim. Trial Practice* § 23:16 (Oct. 2018 update)). The defense of necessity also requires an “immediately necessary action, justifiable because of an imminent threat, where the action is the only means to avoid the harm.” *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998).

In this case, we agree with the trial court that necessity was not fairly raised by the proof. Considering the evidence in the light most favorable to Defendant, Investigator Bozza testified that Defendant claimed Ms. Grady had expressed suicidal ideation at some point in the past, which according to Defendant led him to place the shotgun inside the Jeep. However, Ms. Grady did not mention any intent to harm herself or others when Investigator Bozza interviewed her. Furthermore on the day of Defendant’s arrest, Defendant drove the Jeep to the residence with the shotgun still underneath the seat. Ms. Grady told Investigator Bozza that she had previously searched the Jeep and saw the shotgun; one could reasonably infer that if Defendant had an immediate concern over Ms. Grady’s well-being, he would not have kept the shotgun in the Jeep, where Ms. Grady knew Defendant had placed it previously. Thus, the evidence produced at trial established that Defendant’s placing and keeping the shotgun inside the Jeep was not immediately necessary to prevent Ms. Grady from inflicting imminent harm upon herself or others. The trial court thus did not err in refusing Defendant’s requested instruction on necessity, and Defendant is not entitled to relief on this issue.

### III. Conclusion

For the above-stated reasons, we affirm the judgments of the trial court.

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MATTHEW J. WILSON, JUDGE